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No. 625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

GEORGIA RAILROAD AND BANKING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 623

GEORGIA RAILROAD AND BANKING COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for petitioner have examined the Government's memorandum in opposition to the petition for certiorari and wish to reply only to correct two apparent misconceptions of government counsel.

Respondent asserts (R. Memo, p. 1) that the two issues presented in the petition are discrete; we submit that they are related. The first issue is whether the taxpayer, as the beneficial owner of certain corporate stocks and whose investment produced the corporate income, or its lessees to whom they were assigned, is entitled to the dividends-

received deduction based on the earnings distributed as dividends; the second issue involves the right of the taxpayer, as owner, to recover tax-free that part of its basis allocable to its leasehold interest in the securities. The first issue raises the question whether the taxpayer was the real beneficial owner of the leased stocks and, as such, entitled to the income therefrom; the second issue relates to the same securities and the same lease the basis of which it seeks to recover through amortization allowances.

Secondly, aside from the fact that both tax disputes relate to the same property and to the rights of the parties under the same lease, both involve a disregard of the findings of fact of the trial court without any determination that such findings were clearly erroneous. Relative to the first issue, the district court found that the taxpayer was the beneficial owner of the leased securities and as such entitled to the income therefrom; the Fifth Circuit's decision is predicated on the opposite assumption. On the second issue, the trial court made findings as to the amount of the taxpayer's basis allocable to its retained interest in the leased securities and the amount recoverable as depreciation (amortization) during the taxable period; again the reviewing court disregards these findings.

Moreover, the two issues have in common the reviewing court's disregard of decisions of this Court, one of the decisions (*Wright* v. *Louisville & Nashville Railroad Company*, 236 U. S. 287) having dealt with the same subject matter, i. e., the taxable status of the same lessor and lessees in respect of the same property.

The other misconception on which petitioner would like to comment appears in the Government's memorandum (p. 5) wherein the Government argues, "Petitioner would

receive an unwarranted tax advantage if allowed to create deductions in this manner." Surely, the taxpayer seeks no unwarranted tax advantage when it seeks to recover the basis of its retained leasehold interest amounting to $1,596,625. The point made (R. Memo, p. 4) that capital stock, like land, is a non-depreciable asset is irrelevant since we are here concerned with the amortization of a terminable leasehold interest in property, which is a wasting asset. Unless amortization is allowed, the taxpayer will irrevocably lose the cost or March 1, 1913 value of its leasehold interest without any corresponding benefit to anyone. Disallowance of the amortization deductions would bestow an unwarranted tax advantage on the Treasury; to the extent of such disallowance, the tax is imposed on the taxpayer's capital recoupments, not on its income. The creation of loopholes in the law, even when they favor the Treasury, should not be sanctioned.

Respondent's memorandum opposing certiorari suggests that the manner in which the taxpayer disposed of the future interest was unusual and that the questions of law presented are novel. (R. Memo, pp. 1, 7.) Plainly, the disposition of property by a dividend is not unusual. Since the validity of the dividend has not been challenged, the taxpayer's position as to the property retained is exactly the same after the 1954 dividend as it would have been had it sold the remainder interest. Long-term leases such as that involved here were quite common among railroads and telegraph companies in the latter part of the nineteenth century. Of course, the facts in one tax dispute differ from those involved in others but this does not mean that the questions of law are unusual or novel. Surely, this taxpayer ought not to be denied the tax-free recovery of its invest-

ment in its leasehold property merely because it disposed of the remainder interest in the property by a taxable dividend instead of a taxable sale.

Respectfully submitted,

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